LEOLARIS (M) SDN BHD

v.

BUMIPUTRA COMMERCE BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUIT NO: D5-22-219-2003]
3 AUGUST 2009

BANKING: *Cheques - Forged cheques - Bank bound by mandate given by customer - Bank to exercise reasonable skill and care in executing customer's orders - Whether defendant shown not to have exercised reasonable skill and care*

CONTRACT: *Breach - Express and implied terms of contractual arrangements between parties - Breaches relating to identified signatories of cheques - Whether plaintiff knowingly or negligently contributed to the forgery or the making of the unauthorized signature of the cheques - Bills of Exchange Act 1949, s. 73A*

CIVIL PROCEDURE: *No case to answer - Election - Defendant opted not to lead evidence on any of its defences - Failure to cross-examine plaintiff's witnesses - Defendant to be treated as having abandoned its pleaded case - Whether submission of no case to answer properly taken up by defendant - Bills of Exchange Act 1949, s. 73A*

The plaintiff is a company involved in the pub and restaurant business. In 2001, the plaintiff opened a current account bearing number 1427-0003269-05-04 (account) at the defendant bank's branch at No. 21 & 23, Lorong Arakiri 1, Lucky Gardens, 59100, Kuala Lumpur. As part of its express arrangements with the defendant, all four of the plaintiff's directors were authorized signatories to this account. Any one of the plaintiff's four directors may sign cheques for amounts up to RM5,000 whereas for amounts exceeding RM5,000 the cheques must be signed by any of two of the four directors. A circular resolution dated 16 August 2001 to this effect was furnished to the defendant and specimen signatures were also provided in the registration cards of the defendant.

The plaintiff subsequently discovered that 248 cheques totalling to a sum of RM1,091,921.78 had been paid out from its account and a police report was lodged. The plaintiff sued the defendant for recovery of that sum claiming forgery of cheques and unauthorized payments. The plaintiff claimed that payments on the 248 cheques

were in breach of: (i) the express terms relating to identified signatories as conveyed in the circular resolution (ii) the implied terms relating to the defendant's failure to protect the plaintiff from being defrauded and to make payments only on cheques which were regular and unambiguous in form; and (iii) the contractual arrangements between the parties.

The defendant pleaded reliance on s. 73A of the Bills of Exchange Act 1949 (Act 204). By this the defendant alleged that the plaintiff had knowingly or negligently contributed to the forgery or the making of the unauthorized signature. In other words the signatures, though forged, would be deemed to be signatures of the authorized signatories.

At the trial, the plaintiff called four witnesses who testified on the account arrangements with the defendant, the internal distribution of responsibilities in the plaintiff company, discovery of the discrepancies in the 248 cheques, the action taken upon such discovery, and the status and genuineness of the signatures on the 248 cheques. The defendant opted not to cross-examine any of these witnesses. At the close of the plaintiff's case, the defendant submitted that there was no case to answer. When put to election by this court, the defendant elected not to call any evidence. The defendant was well aware of being bound by this election and though reminded of the consequences of such a submission, chose to stand by the decision.

Held (allowing the plaintiff's claim with costs)

(1) The whole submission of the defendant focused on the single issue of s. 73A of Act 204. By such a submission of no case to answer, the defendant was stating that on the face value of the evidence led, the plaintiff had not made out its case in law. Alternatively, that the evidence led was so unsatisfactory or unreliable that the burden of proof had not been discharged. The court was then obliged to consider this submission in the light of the evidence tendered. The evidence led by the plaintiff enjoyed a certain status and quality in that it is all assumed to be true, more so when there had been no cross-examination of all four witnesses by the plaintiff. The evidence of these witnesses therefore stood unchallenged. Further, with no witness or evidence available for consideration in the defendant's favour, the circumstances were ripe for adverse inference against the defendant. *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* (refd); *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* (foll). (paras 16-19)

(2) The s. 73A defence could not be considered because it was not offered for consideration by the defendant's own option. The operation of this provision was not automatic. Evidence of 'good faith' on the part of the person who pays the cheque *ie*, the defendant, must still be adduced. The defendant consciously opted not to lead such necessary evidence or for that matter, any of its other defences, and must bear the consequences. The submissions on s. 73A would also be disregarded because of the defendant's failure to cross-examine the plaintiff's witnesses. If issues are not pursued at the very least through cross-examination of the plaintiff's witnesses, then the plaintiff is entitled to assume that the issues pleaded by the defendant have been abandoned. Having failed to cross-examine without any valid reason, the defendant must and will be treated as having abandoned its pleaded case, including its defence under s. 73A. Hence, the submission of no case to answer had not been properly taken by the defendant here. *Teo Hock Guan & Anor v. Johore Builders & Investments Sdn Bhd* (foll); *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* (foll). (paras 20-29)

(3) Nevertheless, the court must still examine whether on the oral and documentary evidence before it, the plaintiff had proved its case with all the attending qualities or features of unchallenged testimonies. The existence of the contract relating to the account was not in dispute. It was also not in dispute that amongst the express terms of the contract, only authorized signatories to which the plaintiff had provided a valid resolution and specimen signatures may sign the plaintiff's cheques. The court found all four witnesses to have given credible and satisfactory evidence of what had transpired. The evidence also showed that the signatures on all 248 cheques to be obviously not the same as that on the specimens. The requirements under s. 47 of the Evidence Act 1950 were satisfied. The evidence further showed payments for similar amounts at least twice or three times per day on a regular basis. Such payments would have put any reasonable banker on inquiry. If not to call the plaintiff, the defendant could at the very least comply with the express term of the contract and physically compare the signatures with the specimen signatures provided. This would have readily shown the signatures to be different from the specimen signatures. These express terms, including the specimen signatures, were part of the mandate given by the plaintiff to the defendant. The plaintiff had clearly proved its

A case based on contract. The defendant had been shown not to have exercised reasonable skill and care in executing both the express and implied terms of the contract between the two parties. The evidence of the damage and loss was the sum paid out under the 248 cheques. The burden of proof had been
B discharged by the plaintiff. Accordingly, the plaintiff's claim is allowed. *Proven Development Sdn Bhd v. Hongkong and Shanghai Banking Corp* (foll); *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* (foll); *Barclays Bank Plc v. Quincecare Ltd and Another* (refd). (paras 30-37 & 39)

C **Case(s) referred to:**

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 ***(foll)***

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(foll)***

D *Barclays Bank Plc v. Quincecare Ltd and Another [1992] 4 All ER 363* ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Leolaris (M) Sdn Bhd v. RHB Bank Berhad [2009] 1 LNS 285 HC ***(dist)***

Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA ***(refd)***

E *Public Bank Bhd v. Anuar Hong & Ong [2005] 1 CLJ 289 HC* ***(dist)***

Proven Development Sdn Bhd v. Hongkong & Shanghai Banking Corp [1998] 5 CLJ 644 HC ***(foll)***

Teo Hock Guan & Anor v. Johore Builders & Investments Sdn Bhd [1996] 4 CLJ 184 CA ***(foll)***

F **Legislation referred to:**

Bills of Exchange Act 1949, ss. 24, 73A

Evidence Act 1950, s. 47

For the plaintiff - RS Sodhi; M/s Sukhdev & Co

For the defendant - Wong Hok Mun (Arham Rahimi with him); M/s Azim,
G *Tunku Farik & Wong*

Reported by Susheila Sreedharan

H

JUDGMENT

Mary Lim JC:

Background Facts

I **[1]** The plaintiff is a company involved in the pub and restaurant business. As is normal and in fact rather necessary for good financial management, bank accounts were opened. In 2001, the

plaintiff opened a current account bearing number 1427-0003269-05-04 (account) at the defendant bank's branch at No. 21 & 23, Lorong Arakiri 1, Lucky Gardens, 59100, Kuala Lumpur.

[2] It is not in dispute that as part of its express arrangements with the defendant, all four of the plaintiff's directors were authorized signatories to this Account. For cheques bearing amounts up to RM5,000 such cheques may be signed by any one of the plaintiff's four directors. Where the amounts exceeded RM5,000 the cheques must be signed by any of two of the four directors. A circular resolution dated 16 August 2001 to this effect was furnished to the defendant (Bundle A – p. 9). Specimen signatures were also provided in the registration cards of the defendant: Bundle A pp. 197-200.

[3] The plaintiff subsequently discovered that a total of 248 cheques bearing a total sum of RM1,091,921.78 had been paid out from its account (Bundle B pp. 1-196). A police report was lodged: Bundle B - p. 201. The Plaintiff sued the defendant for recovery of that sum claiming forgery of cheques and unauthorized payments.

Plaintiff's Claim

[4] The cause of action is founded in contract. According to the plaintiff, the payments on those 248 cheques were in breach of both express and implied terms of the contractual arrangements between the parties. The express terms breached relate to the identified signatories as conveyed in the circular resolution furnished to the defendant whereas the implied terms relate to the failure of the defendant to protect the plaintiff from being defrauded and to make payments only on cheques which were regular and unambiguous in form. It is the plaintiff's case that the signatures of all 248 cheques do not comply with the express arrangements as contracted between the parties.

Defence

[5] In the amended defence filed and as taken up in the submissions of learned counsel for the defendant, the principal defence pleaded reliance on s. 73A of the Bills of Exchange Act 1949 (Act 204). By this the defendant alleged the plaintiff knowingly or negligently contributed to the forgery or the making of the unauthorized signature. In which case the signature shall be deemed to be the signature of the person it purports to be in favour

of the defendant who had paid in good faith. In other words the signatures, though forged, would be deemed to be signatures of the authorized signatories.

Submission Of No Case To Answer

[6] This case was set down for a five day hearing from 6-10 July 2009. These dates were fixed on 4 February 2009 when the case came up for case management. On that date, the plaintiff's solicitors mentioned for the defendant's solicitors. The defendant was therefore well aware of the hearing dates. In fact, by letter dated 2 July 2009, the parties sought an adjournment of the hearing on the basis of needing more time to settle the claim. The application for adjournment was refused.

[7] On the first day of trial (a Monday) the solicitors for the defendant sought an adjournment. This time on the basis of having just been engaged on Friday evening at 4.45pm to take over from the previous solicitors. The plaintiff who was ready for trial with their four witnesses, objected. The adjournment was refused as the reasons given were not reasonable, cogent or just. It is a basic rule that no counsel should accept a brief unless he is ready, able and willing to conduct the brief. Here, learned counsel for the defendant quite frankly informed me that he had no choice but to accept the brief because his firm is on the defendant's panel of lawyers. Unfortunately, that is not a good reason for adjournment.

[8] After standing down the matter upon counsel for the defendant's request, the trial commenced. The plaintiff called four witnesses. These witnesses testified on the account arrangements with the defendant, the internal distribution of responsibilities in the plaintiff company, discovery of the discrepancies in the 248 cheques, the action taken upon such discovery, and most important the status and genuineness of the signatures on the 248 cheques.

[9] The defendant opted not to cross-examine any of these witnesses. Specifically, the court was informed by learned counsel for the defendant that these were his client's instructions and he was adhering to them. All four witnesses were therefore not cross-examined.

[10] At the close of the plaintiff's case, the defendant submitted that there was no case to answer. When put to election by this court, the defendant elected not to call any evidence. The defendant was well aware of being bound by this election and though

reminded of the consequences of such a submission, chose to stand by the decision. These steps and decision taken are critical and "not mere formality but one of essential justice" – *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509. If the election is not offered, it is open to the defendant to call evidence after making and failing in its submission of no case to answer. That is improper as "... no judge should be asked for his conclusion or opinion on the evidence until such evidence is concluded." – *Jaafar Shaari & Siti Jama Hashim* p. 519. Since the defendant had elected not to give evidence the defendant will stand or fall by the submission made.

[11] As it turned out, the submissions offered by learned counsel for the defendant was not to say that the plaintiff had failed to make out its case in law or, that the evidence led was so unsatisfactory and unreliable that the plaintiff's case had not been made out. Instead, what was submitted was the defence under s. 73A of the Bills of Exchange Act 1949 (Act 204) using the evidence of the plaintiff.

[12] In the submissions of learned counsel for the defendant, several factors were alluded to as proving negligence on the part of the plaintiff within the meaning of s. 73A. These factors being – the number of cheques involved (248 cheques), the time span of 15 1/2 months; the fraud being committed by one of the plaintiff's own employees; the fact that monthly bank statements were sent; and the admission of PW4 of her duties and breach of her duties. These factors suggest a systemic failure on the part of the plaintiff amounting to negligence. These same factors had also facilitated the forgery for which s. 73A affords a complete defence. It was the submission of the defendant that the burden of proof was with the plaintiff to prove no negligence and no knowledge of the circumstances which will otherwise bring into operation the deeming provision of s. 73A.

[13] Learned counsel relied on *Public Bank Bhd v. Anuar Hong & Ong* [2005] 1 CLJ 289 and the then unreported decision of *Leolaris (M) Sdn Bhd v. RHB Bank Berhad* [2009] 1 LNS 285. In both decisions the court dismissed the claims. In *Public Bank Bhd*, the court found the plaintiff had not exercised sufficient supervision over its accounts clerk so as to protect itself from the misconduct of its own employees; failed to scrutinize monthly statements; and failed to notify the defendant bank of any discrepancies or unauthorized cheques. In the latter decision, the primary basis was s. 73A of the

Bills of Exchange Act. The defendant further pointed out that in the latter decision, 31 cheques spanning over a period of less than one month were still circumstances that weighed with the court. What more in the instant situation where 248 cheques spanning a period of 15 1/2 months was involved.

[14] This interpretation was obviously vehemently opposed by learned counsel for the plaintiff. Its claim is contract based and it bears the burden of proving its existence and the relevant express and implied terms alleged to be breached. Negligence is not a relevant issue as it is not part of the plaintiff's claim. On the other hand, s. 73A is a defence *albeit* provided by statute. In order to rely on it evidence of good faith on the part of the defendant must be shown. In any event the matters necessary for proving s. 73A must be put to the plaintiff's witnesses for explanation or other evidence led by the defendant.

Decision

[15] There are two matters that merit consideration. First, the submission of no case to answer – whether the submission has been properly and successfully taken on the facts of this case. Secondly, whether the plaintiff has made out a case in any event.

Is The Submission Of No Case To Answer Properly Taken?

[16] The whole submission of the defendant focuses on the single issue of s. 73A of Act 204 which states:

> Knowingly or negligently facilitating forgery
>
> 73A. Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

[17] The principles and consequences of a submission of no case to answer have been carefully enunciated in the Supreme Court decision of *Jaafar Shaari & Siti Jama Hashim*. This decision was recently revisited by the Court of Appeal in *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369. I can only set out these principles as a reminder and for application.

[18] First and foremost, the meaning of this submission. By such a submission, the defendant is stating that on the face value of the evidence led, the plaintiff has not made out its case in law. Alternatively, that the evidence led is so unsatisfactory or unreliable that the burden of proof has not been discharged. This was clearly reminded in *Mohd Nor Afandi Mohamed Junus* p. 380. The court is then obliged to consider this submission in the light of the evidence tendered.

[19] It must be borne in mind that the evidence led by the plaintiff enjoys a certain status and quality in that it is all assumed to be true - *Mohd Nor Afandi Mohamed Junus* p. 381. In my view, this is even more so when there has been no cross-examination of all four witnesses for the plaintiff so that at the very least the weight, veracity or the credibility of the evidence may be challenged. The evidence of these witnesses therefore stands unchallenged. Further, with no witness or evidence available for consideration in the defendant's favour, the circumstances are ripe for adverse inference against the defendant.

[20] To me, s. 73A is a defence to the claim. It is pleaded at para. 8 of the Amended Defence: "Selanjutnya secara alternatif defendan mengatakan, plaintif telah bertindak secara cuai atau telah dengan disedarinya memudahkan pemalsuan itu maka secara implikasi undang-undang di bawah s. 73A Akta Bil Pertukaran 1949, tandatangan itu hendaklah disifatkan sebagai tandatangannya". Paragraphs 9(a) to (d) provide particulars of the plaintiff's alleged negligence.

[21] This defence cannot be considered for two reasons.

[22] First, because it is not offered for consideration by the defendant's own option. Second, there has been no cross-examination of any of the plaintiff's witnesses.

[23] In a submission of no case to answer, the defences pleaded are not under consideration. To put it bluntly, on such an occasion the defendant is actually saying that it need not bother to offer and lead any evidence on any of the pleaded defences because the plaintiff's case is bad as it has not been made out and ought therefore to be dismissed without more. It is still the plaintiff's case that is scrutinised for the sole purpose of establishing whether the defendant has made a right submission. If the submission is properly taken on the law and on the facts, then the plaintiff's case

would be dismissed. However, where the defendant fails in its submission and the plaintiff succeeds in discharging the burden of proof, the plaintiff's case will be allowed. That is why it is said that the defendant will stand or fall by the submission.

[24] But, this is not what has transpired here. The submissions made are all about s. 73A of Act 204. As I have said, s. 73A is a defence afforded under statute. But that does not mean it is to be treated differently. In any case, it can be readily gathered from s. 73A itself that the operation of this provision is not automatic. Evidence of 'good faith' on the part of the person who pays the cheque, the defendant, must still be adduced. The defendant consciously opted not to lead such necessary evidence or for that matter, any of its other defences, it must now bear the consequences.

[25] The second reason why the submissions on s. 73A will be disregarded is because of the defendant's failure to cross-examine the plaintiff's witnesses. If issues are not pursued at the very least through cross-examination of the plaintiff's witnesses, then the plaintiff is entitled to assume that the issues pleaded by the defendant have been abandoned.

[26] In *Teo Hock Guan & Anor v. Johore Builders & Investments Sdn Bhd* [1996] 4 CLJ 184 the Court of Appeal agreed with the submissions made on this point:

> In our judgment, the learned judge was entirely right in ignoring the point because it was not pursued under cross-examination of the plaintiff's witness. In the absence of a suggestion that the delay was caused by the so-called extra works, the judge was entitled to proceed upon the basis that the defendants were no longer advancing this as a reason for the delay. The effect of a party failing to put its case squarely to its opponent's witness has been sufficiently addressed by this court in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors* [1995] 2 MLJ 770, 794, and we find it unnecessary to repeat what was there said.

[27] In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639, the Court of Appeal decided it was essential that a party's case be expressly put to the opponent's material witnesses when they are under cross-examination. A failure to do so may be treated as an abandonment of the pleaded case and if a party, without valid reason, refrains from doing so, he may then be barred from raising the same in argument.

[28] In these two leading authorities, defence was led but no cross-examination took place. In the context of the current proceedings where the arguments on s. 73A were raised in a submission of no case to answer, I believe the principle has more forceful application. Having failed to cross-examine without any valid reason, the defendant must and will be treated as having abandoned its pleaded case, including its defence under s. 73A. The defendant should be barred from now raising the same issue in its submissions.

[29] The arguments on s. 73A must therefore be disregarded. To raise it in the manner as undertaken in this instance may even be an abuse of the right of a submission of no case. It is therefore my finding that the submission of no case to answer has not been properly taken by the defendant here.

Has The Plaintiff Made Out Its Case?

[30] Be that as it may, I find it still necessary to examine whether on the oral and documentary evidence before me, the plaintiff has proved its case with all the attending qualities or features of unchallenged testimony assumed to be true. Since the plaintiff's case is premised on contract, the existence of the contract, the relevant express and implied terms, breach and damage suffered must be proved. Once that has been established through credible evidence then the burden of proof is discharged.

[31] Two directors of the plaintiff testified – William Leslie Addington (PW1) and John Edwin Dixon (PW2). Both were authorized signatories of the account. PW1 testified as to the existence of the account, the resolution and the specimen signatures furnished to the defendant. He was the person who took immediate action upon learning of the missing 248 cheques. Amongst the actions taken was the convening of a board of directors meeting, informing the defendant to cease all payments from the account, and the making of a police report on the matter. PW1, a person acquainted with the handwriting or signature in this case of PW2 was able to identify and state categorically that the signatures on the 248 cheques were not of PW2's. He pointed out the discrepancies on those cheques which to him were obvious and amount to failure of the defendant to make inquiries as an honest and reasonable banker would have made.

[32] The person whose signature was forged was PW2. He testified and denied any of the signatures on the 248 cheques were his and took pains to point out what was perceived as obvious differences in his signature from those in the cheques.

[33] Ng Wee Heong (PW3) was the plaintiff's third witness. He testified based on his experience which I find relevant and appropriate. As a person who had served with the Current Accounts Department of an unrelated bank for 18 years and who used to clear between 1000 to 1500 cheques per week, PW3 gave his view in detail as to the reasons why he would have refused to clear the 248 cheques if the same had been presented to him for clearance.

[34] Finally, Cheong Lai Hoong @ Christine (PW4) an accounts executive of the plaintiff testified as to the keeping of the cheques and how she had discovered the forgery on 12 July 2002. Amongst her duties was to reconcile bank statements sent by the defendant. She started this part of her duties from May 2002, after the last date of the 248 cheques. According to her, the monthly statements were normally received by one Juliana Siew Mei Chuen who would then forward the statements to PW4 for reconciliation. She, as a person acquainted with the handwriting/signature of PW2 was also able to identify and testify that the signatures on the 248 cheques were different and not PW2's handwriting/signature.

[35] The existence of the contract relating to the Account is not in dispute. It is also not in dispute that amongst the express terms of the contract, only authorized signatories to which the plaintiff has provided a valid resolution and specimen signatures may sign the plaintiff's cheques. I find all four witnesses to have given credible and satisfactory evidence of what had transpired. The evidence also showed that the signatures on all 248 cheques to be obviously not the same as that on the specimens. The requirements under s. 47 of the Evidence Act 1950 (Act 15) have been satisfied. The evidence further showed payments for similar amounts at least twice or three times per day on a regular basis. Such payments would have put any reasonable banker on inquiry. If not to call the plaintiff, at the very least to comply with the express terms of the contract and physically compare the signatures with the specimen signatures provided. This would have readily shown the signatures to be different from the specimen signatures. In fact, it was conceded by learned counsel for the defendant that the cheque at p. 104 of Bundle B for RM35,357 with only one signatory ought not to have been paid. These express terms, including the specimen

signatures are part of the mandate given by the plaintiff to the defendant. As stated in *Proven Development Sdn Bhd v. Hongkong and Shanghai Banking Corp* [1998] 5 CLJ 644:

> It is also to be observed that banker is bound by contract to observe the mandate given by the customer and any breach of that mandate unless ratified by the customer would tantamount to a breach of that contract. And as stated by Saville J in *Redmond v Allied Irish Banks Plc* [1987] FLR 307:
>
> > There is clear authority for the proposition that a bank owes its customer a duty to take reasonable care and skill in interpreting, ascertaining and acting in accordance with the instruction of this customer.

[36] Similarly, in *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1, the Federal Court said "... In our judgment, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders (see *Barclays Bank Plc v. Quincecare Ltd and Another* [1992] 4 All ER 363)." To me, the plaintiff has clearly proved its case based on contract. The defendant has been shown not to have exercised reasonable skill and care in executing both the express and implied terms of contract between the two parties. The evidence of the damage and loss is the sum paid out under the 248 cheques. The burden of proof has been discharged by the plaintiff.

[37] Since there is no evidence of the defendant before me to consider and with my finding the evidence of the plaintiff to be "... satisfactory, reliable and by no stretch of the imagination farfetched, to vitiate the presumption of truth at the stage of the plaintiff. With the quality evidence before the court presumed to be true, the logical step was for the court to find for the appellant, what with the respondent not being assisted by the non-materialization of rebuttal evidence" as in *Mohd Nor Afandi Mohamed Junus* at p. 384, I find the case for the plaintiff.

[38] I would like to add that the authorities submitted by learned counsel for the defendant are quite easily distinguished. In both decisions, there were cross-examinations of the plaintiff's witnesses and of greater significance; submissions of no case to answer were not taken. Instead, there were evidence led by the defence and submissions advanced under s. 24 or 73A of the Bills of Exchange Act 1949 [Act 204], as the case may be. These defences were then ultimately accepted by the court. In sharp contrast, the turn of

events in the facts and conduct of this case and decisions opted by the defence on its own volition are so diametrically different for the reasons already explained.

[39] In the circumstances, the plaintiff's claim is allowed in the terms as set out in prayers 7(a), (b) and (c) (interest at the rate of 8% per annum) of the amended statement of claim. Upon directions of this court, both counsel submitted on the matter of the appropriate amount for costs. Having heard arguments, I ordered the sum of RM50,000 as reasonable costs to the plaintiff.